ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of	)	MM Docket No. 93-94
Scripps Howard Broadcasting Company	)	File No. BRCT-910603KX
For Renewal of License of Station WMAR-TV, Baltimore, Maryland	)	
and	)	
Four Jacks Broadcasting, Inc.	)	File No. BPCT-910903KE
For Construction Permit for a New Television Facility on Channel 2 at Baltimore, Maryland	)	

To: The Honorable Richard L. Sippel
Administrative Law Judge

OPPOSITION TO PETITION FOR CERTIFICATION

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys, hereby opposes the Petition for Certification ("Petition") of the Hearing Designation Order ("HDO") in this case filed by Scripps Howard Broadcasting Company ("Scripps") on April 8, 1993. Proceeding under "Section 1.106(a)(2), and alternatively Section 1.115(e)(3), of the Commission's rules," Scripps requests the Presiding Judge to certify to the full Commission "two questions raised" in a 19-page draft Application for Review that Scripps appends to its Petition.[1/] As set forth

1/ The draft application for review that Scripps appends to its Petition reflects Scripps' confusion as to the rules that it invokes. If Scripps is requesting certification pursuant to Section 1.106(a)(2), then Scripps is not permitted

(continued...)

below, there is no basis, under either of the rule provisions that Scripps cites, for certifying the HDO as Scripps requests. Scripps' Petition should therefore be denied.

1. The HDO in this case refused to find that Four Jacks' Channel 2 application was "inconsistent" with an application by Chesapeake Television, Inc. -- an entity in which Four Jacks' principals indirectly hold interests -- for the renewal of license of WBFF(TV), Channel 45, Baltimore, Maryland. The HDO acknowledged the fact that Four Jacks' principals had pledged to divest their interests in WBFF(TV) should Four Jacks be successful, and concluded that the inconsistent application rule "was not intended to apply to circumstances such as those before us." The staff also observed that while the WBFF(TV) renewal application was pending on September 3, 1991, when the Four Jacks

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1/(...continued)
certification of any "application for review." Section 1.106(a)(2) provides only for a request for certification within the period allowed for filing a petition for reconsideration, which request the Presiding Judge will either grant or deny. If, on the other hand, Scripps is proceeding under Section 1.115(e)(3), then its Application for Review is not only presently insufficient to meet minimal pleading requirements, having not been signed by counsel (see Section 1.52), but is a whopping 14 pages longer than permitted by Section 1.115(e)(3).

Accordingly, in this pleading Four Jacks addresses only Scripps' Petition for Certification. As shown herein, there is no basis for certification under either of the rule provisions Scripps cites. However, in the event the Presiding Judge certifies an application for review by Scripps pursuant to Section 1.115(e)(3) (and Scripps manages to tender an application for review which complies with that provision's procedural requirements), Four Jacks reserves the right to file a substantive response to such an application for review within the time frame specified in Section 1.115(e)(3).

application was filed, it was granted 23 days later -- well before the issuance of the HDO. Citing Section 1.106(a)(2) of the Rules, and alternatively Section 1.115(e)(3), Scripps requests certification of this aspect of the HDO. Scripps' Petition, however, is insufficient to justify certification under either of these provisions.

2. Section 1.106(a)(2) of the Rules states, in pertinent part, as follows:

> Within the period allowed for filing a petition for reconsideration, any party to the proceeding may request the presiding officer to certify to the Commission the question as to whether, on policy in effect at the time of designation or adopted since designation, and undisputed facts, a hearing should be held. If the presiding officer finds that there is substantial doubt, on undisputed facts, that a hearing should be held, he will certify the policy question to the Commission with a statement to that effect. (Emphasis added).

3. In adopting Section 1.106(a)(2), the Commission made clear that "we are not prepared to provide for reconsideration of any 'question of policy.'" As the Commission pointed out, "[t]he term 'question of policy' . . . is insufficiently definitive and would do little to limit the submission of petitions for reconsideration of designation orders." Thus, the Commission provided that a question may be certified only "upon a finding of substantial doubt" whether a hearing should be held. Summary Decision Procedures, 34 F.C.C.2d 485, 491 (1972).

4. Scripps' Petition accuses the staff of a "violation of established Commission policy as reflected in the Commission's inconsistent application rule and its precedents applying the

rule." Petition at 4. Unfortunately for Scripps, not only is there a total absence of "substantial doubt" as to the correctness of the policy employed by the staff in finding no violation of the inconsistent application rule, but the central premise of Scripps' challenge has been affirmatively rejected by the Commission.

5. In finding that Four Jacks had not violated the inconsistent application rule, the staff applied a consistent and long-established interpretation of that rule: an applicant that owns an existing station in a given community does not violate the inconsistent application rule by applying for a new station in that community and pledging to divest the existing one. Routinely in such cases, the Commission merely conditions grant of the new application on the applicant's divestiture of its existing facility, as the HDO did here. For example, in Atlantic Radio Communications, Inc., 6 FCC Rcd 4716 (M.M. Bur. 1991), one of the applicants, Seaira, Inc., held a construction permit for a station in the same area where the new station would be located. That applicant pledged, in the event the new application was granted, to divest the facility for which it held a construction permit. The Commission simply set the new application for hearing, and conditioned any grant on divestiture of the existing construction permit. Id. at 4721. The situation is the same here, and there is no authority indicating that the purely fortuitous fact that the existing facility was up for license renewal warrants a different result.

6. Big Wyoming Broadcasting Corp., 2 FCC Rcd 3493 (1987), which Scripps cites as "requiring the dismissal of Four Jacks' application," does nothing to assist Scripps. The inconsistent application in Big Wyoming was an application for a new FM station, filed while another new FM application by a commonly owned entity for a station in the same area was still pending. Big Wyoming did not involve an applicant that owned an already-authorized facility. Scripps simply has pointed to no case holding that an application for a new station in a community is inconsistent with a renewal application for the applicant's existing facility, where the applicant has proposed to divest that existing facility.

7. Lacking any pertinent authority for its claims, Scripps is relegated to conjuring up an amorphous policy argument that not only fails to create any "substantial doubt" as to how the Commission interprets the inconsistent application rule, but in fact has expressly been rejected by the Commission. Citing the Commission's concurrent decisions in Wabash Valley Broadcasting Corp., 18 R.R. 559 (1959) and 18 R.R. 562 (1959), Scripps proclaims that "the staff somehow missed Scripps Howard's central theme, that:

> Well established Commission policy requires that television licensee applicants -- like Four Jacks' principals -- who seek to operate on a new channel while at the same time pursuing a renewal application for their existing authorization in the same community must seek the new channel by modification of their existing channel's authorization rather than by applying for a new facility. To pursue a new authorization . . . violates the plain terms and the intent of the inconsistent application rule.

Petition at 5-6.

8. Scripps' citation of Wabash Valley for this proposition [redacted]

to another entity. The Commission reversed the Bureau's denial and effectively vacated the holding of Southern Keswick itself:

> Although the Bureau correctly applied the holding of Southern Keswick to the facts presented here, on reflection we find that holding's definition of "mutually inconsistent" applications to be unduly restrictive and inconsistent with our policy which allows a licensee to apply for a new facility which would, if granted, violate the multiple ownership rules . . ., provided the licensee agrees to divest itself of the existing station prior to program tests for the new facility. Similarly, our "trade-up" policy allows a licensee to purchase another station in the same market provided the licensee agrees to simultaneously divest itself of the old facility.
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> * * *
>
> In view of these inconsistencies, we believe it is necessary to modify Southern Keswick and redefine "mutually inconsistent" applications in this context.

66 R.R.2d at 81.

11. Thus, it appears that Scripps has "missed" governing Commission policy, not that the staff "missed" Scripps' "central theme." By seeking a new Baltimore facility while pledging to divest their existing Baltimore station, Four Jacks' principals are doing exactly that which the Commission -- in a case decided more than five years prior to the filing of Four Jacks' application -- held to be permissible.

12. Scripps may disagree with the Commission's interpretation of the inconsistent application rule. Such disagreement, however, is insufficient to merit a grant of Scripps' Petition. There is no "substantial doubt" as to the policy the staff applied in the HDO, as is required for certification under Section 1.106(a)(2). Nor is there any basis

for certification of an application for review under Section 1.115(e)(3). That provision requires a showing of a controlling question of law "as to which there is substantial ground for difference of opinion." (Emphasis added). As shown above, the crystal-clear interpretation of the inconsistent application rule that the staff applied to Four Jacks admits of no "ground for difference of opinion."

Conclusion

To carry its burden, Scripps is obligated to show more than its mere disagreement with the "policy" under which the HDO found that Four Jacks had not violated the inconsistent application rule. Scripps is bound to show that that policy is in "substantial doubt," or that there is "substantial ground for difference of opinion" over the question of law involved. As shown above, Scripps has met neither standard. Its Petition should therefore be denied.

Respectfully submitted,

FOUR JACKS BROADCASTING, INC.

By: _____
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Dated: April 15, 1993

EXHIBIT A

FCC 86-275
36723

In re Application of

WPOW, INC.
WHAZ, East Greenbush, New York

File No. BP-810320AB

Adopted: May 28, 1986
Released: June 4, 1986

[10:309(A)(11), 53:3518] Mutually inconsistent applications; applications for a new station and to assign an existing station in the same market.

Where a broadcast licensee seeks to prosecute both a new station application and an application to assign its existing authorization in the same market, the test of mutual inconsistency will be governed exclusively by technical criteria. If the station proposed for assignment and the proposed new station can technically co-exist, both operating simultaneously in compliance with all relevant protection requirements, the applications will not be deemed mutually inconsistent. Thus, once the threshold requirement of technical co-existence has been met, a licensee may apply for a new facility in the same market provided it agrees to divest the existing license prior to program tests for the new facility. The divestiture of the existing license, however, must be bona fide – an applicant cannot assign only a bare license and retain all assets of the station. This new policy effectively overrules the test of mutual inconsistency articulated in Southern Keswick, Inc. *[24 RR 2d 173]*. WPOW, Inc., 66 RR 2d 81 [1986].

MEMORANDUM OPINION AND ORDER

By the Commission:

1. WPOW, Inc. has petitioned for review of the Mass Media Bureau's denial of its petition for leave to amend its application. WPOW originally filed a application seeking major changes in is existing Station WHAZ(AM), Troy, NY, including a change in community of license to East Greenbush, NY, and change of frequency from 1330 kHz to 640 kHz.[1] WPOW, Inc. subsequently submitted a petition for leave to amend its application, seeking to convert it to a new station proposal for 640 kHz. If granted the 640 kHz application, WPOW, Inc. requested that it then be authorized to assign, without compensation, its license for 1330 kHz to a qualified minority person or group. By letter of Dec. 5, 1984, the Chief, AM Branch denied WPOW, Inc.'s petition and returned its amendment as unacceptable for filing.

2. The Bureau's denial of WPOW, Inc.'s petition for leave to amend was based upon the holding of *Southern Keswick, Inc.*, 24 RR 2d 173 (1972). In *Southern Keswick*, a similar proposal made by an applicant, who requested a change in frequency to a new FM channel in St. Petersburg, FL and a simultaneous assignment of license for its existing channel in St. Petersburg, was denied. The Commission found the two applications to be mutually inconsistent inasmuch as the applicant was proposing a major modification of an existing facility while at the same time attempting to create a second, assignable license from its current authorization in the same city.

3. Although the Bureau correctly applied the reasoning of *Southern Keswick* to the facts presented here, on reflection we find that holding's definition of "mutually inconsistent" applications to be unduly restrictive and inconsistent with our policy which allows a licensee to apply for a new facility which would, if granted, violate the multiple ownership rules (either the duopoly of numerical limitation rules), provided the licensee agrees to divest itself of the existing station prior to program tests for the new facility. Similarly, our "trade-up" policy allows a licensee to purchase another station in the same market provided the licensee agrees to simultaneously divest itself of the old facility.[2] In *Southern Keswick*, the Commission reasoned that the public interest would be better served if the frequency vacated by the applicant was made available for application by competing parties rather than assigned by the licensee to a hand-picked successor. *Id.* at 175. However, under the two policies discussed above, we allow the licensee to choose its successor without the slightest consideration given to the concerns expressed in *Southern Keswick*.

4. In view of these inconsistencies, we believe it is necessary to modify *Southern Keswick* and redefine "mutually inconsistent" applications in this context. Where licensees seek to prosecute both new station and assignment applications in the same market, the test of mutual inconsistency will be governed exclusively by technical criteria. If the assigned station and the proposed new station can technically co-exist, both operating si-

mutually inconsistent.[3] Thus, once the threshold requirement of technical co-existence has been met, a licensee may apply for a new facility in the same market provided it agrees to divest the existing license prior to program tests for the new facility. The divestiture of the existing license, however, must be *bona fide* -- an applicant cannot assign only a bare license and retain all assets of the station. *See Radio KDAN, Inc. et al.*, 11 FCC 2d 943 (1968); *Donald L. Horton et al.*, 10 FCC 2d 271 *[11 RR 2d 417]* (1967); *See also Perfection Music, Inc.*, 30 RR 2d 12 (1974).

5. Since WPOW Inc.'s existing Troy and proposed East Greenbush operations can technically co-exist, we hold that WPOW, Inc.'s petition for leave to amend should be granted. WPOW, Inc. therefore may convert its major modification application to a new station proposal for 640 kHz at East Greenbush[4] and, if awarded the East Greenbush construction permit, assign its existing license for Troy.

6. WPOW, Inc. is presently involved in a hearing with two other mutually exclusive proposals. In its petition for leave to amend, WPOW, Inc. contended that its proposed amendment was a prerequisite to a later showing that it should receive a comparative merit for assigning the 1330 kHz frequency to a minority person or group. Although we hold that WPOW, Inc. should be allowed to amend its application, we do not find that the amendment is entitled to comparative consideration under the circumstances.

7. The deadline established for filing as of right amendments to WPOW, Inc.'s application (the "B" cut-off date) was Nov. 14, 1983. WPOW, Inc. filed its petition for leave to amend almost a year after the "B" cut-off date, on Nov. 9, 1984. An applicant cannot enhance its comparative position subsequent to the "B" cut-off date. *See generally Revised Procedures for the Processing of Contested Broadcast Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202 *[45 RR 2d 220]* (1979). The purpose of establishing cut-off dates is to ensure stability in the hearing process and to allow the applicants adequate time to prepare their comparative cases. This rationale is not suspended, as WPOW, Inc. suggests, when an applicant submits a post-"B" cut-off date amendment purporting to be a minority preference threshold showing.[5]

8. We find, in conclusion, that the test of mutually inconsistent applications articulated in *Southern Keswick, Inc.* is unnecessarily restrictive. We hold, therefore, that if two facilities can technically co-exist, then they are not mutually inconsistent so as to prohibit prosecution of both assignment and new facility applications. Accordingly, WPOW Inc.'s petition for leave to amend hereby is granted. WPOW, Inc., is authorized to assign its existing license, and to convert its application from one seeking major modifications in an existing facility to one seeking a construction permit for a new facility. WPOW, Inc., however, may not enhance its comparative position by acceptance of the amendment.

9. Accordingly, it is ordered that the petition for leave to amend filed by WPOW, Inc. is granted.

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3. Although the petition at issue involves an AM broadcasting station, the new standard articulated here, like *Southern Keswick*, shall apply with equal force to FM and television applications.

4. WPOW, Inc.'s comparative position is not affected by acceptance of the amendment, since the amendment does not constitute a major change within the context of §73.3571(j)(1) of our Rules.

5. Even if the amendment had been filed timely for comparative consideration, there is no precedent for an applicant receiving a comparative merit under these circumstances.

CERTIFICATE OF SERVICE

I, Valerie A. Mack, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, do hereby certify that true copies of the foregoing "OPPOSITION TO PETITION FOR CERTIFICATION" were sent this 15th day of April, 1993, by first class United States mail, postage prepaid, to the following:

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* By Hand

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